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Why It's Time to Engage with the Department of Education's Negotiated Rulemaking

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Key Points

- As Congress debates student loan debt forgiveness and “free college,” Joe Biden’s Department of Education has signaled its intent to use the negotiated rulemaking process to advance these priorities and others.
- New regulations could make taxpayers without college degrees responsible for repaying an even greater share of loans taken by future college students or create entirely new loan repayment programs without congressional action.
- Conservatives and moderates must engage in the rulemaking process if they want to help steer policymaking in more-productive directions.

On the campaign trail, President Joe Biden’s higher education agenda featured prominent promises to forgive student loan debt and make community college debt free. But as Congress continues to debate these high-profile proposals, Biden’s Department of Education has signaled its intent to use a little-known yet powerful regulatory process to take major strides toward these and other goals. This latest round of “negotiated rulemaking” is aimed at transforming higher education policy, potentially driving entire subsets of colleges out of business, and placing taxpayers on the hook for an even greater share of rising college costs. This rulemaking could even create entirely new loan repayment programs and enact new methods of forgiving both current and future loans. While this debate will take place outside the halls of Congress, conservatives should take note and proactively engage in the regulatory process—which they have failed to do

under recent Democratic and Republican administrations alike.

In recent weeks, the Biden Department of Education has solicited nominations to join the first of what are likely to be at least two negotiating committees on several crucial higher education topics. Historically, conservatives have been significantly underrepresented on, or not even nominated to, these panels. Whether this has been due to a relative lack of right-leaning experts or a lack of interest among them, conservatives must engage if they want to influence policymaking more than they previously have.

What Exactly Is Negotiated Rulemaking?

In 1982, an obscure federal agency called the Administrative Conference of the United States (ACUS) suggested that the relationship between federal regulators and regulated parties was “adversarial”

with parties merely “positioning themselves for the subsequent judicial review.”¹ It predicted improvement if both sides could sit at a table and work out their competing interests. Since it was already the case that “lawsuits challenging rules are regularly settled by agreement on a negotiated rule,”² ACUS thought it might make more sense to give agencies the option to negotiate some regulations from the start. Thus, negotiated rulemaking (also known as “neg-reg”) was born.

In developing neg-reg, ACUS focused significantly on rulemakings related to “highly technical standards.”³ Just last year, for example, the US Department of Transportation’s rulemaking on accessible lavatories on single-aisle aircraft convened a group of industry representatives, disability advocates, and others, including those with “technical expertise in accessibility research and development.”⁴ In cases such as this, the affected parties are obvious, and the range of policy choices are limited. As a result, a well-executed negotiation could accommodate the needs of people with disabilities without requiring airlines to do something impossible or prohibitively expensive. This is an example of neg-reg working well—allowing parties with competing interests the opportunity to negotiate and propose a reasonable outcome within a narrowly defined set of policy choices.

Where Negotiated Rulemaking Has Gone Awry in Higher Education

For many higher education matters, however, such negotiations are not so straightforward. To begin, Congress has required rather than merely allowed the Department of Education to use neg-reg for most significant rulemakings related to student loans. In doing so, it ignored the ACUS recommendation that negotiated rulemakings be a “supplemental rulemaking procedure” that “should be viewed as experimental” and that any enabling “legislation should contain a sunset provision.”⁵

Congress went even further, specifically advising the department to include “students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection

agencies” on negotiating panels.⁶ Other relevant parties, such as taxpayers, may not have a chance to directly share their views and represent their interests.

The parties at the table naturally help determine the outcome, but the same is true of parties engaging from the sidelines. Public opinion and involvement by outside groups help the department and the other negotiators decide whether they should be collaborative or combative. Historically, major higher education negotiations rarely achieve consensus.

However, many of the major regulations Secretary Betsy DeVos led on topics such as accreditation, distance and competency education, and even First Amendment issues achieved consensus on every word, letter, and semicolon.⁷ I worked on these regulations, and, admittedly, we worked hard for agreement both because we thought it would improve the policy and because it would be easier for us to finalize it. While a failure to reach consensus allows the agency to go through the normal notice-and-comment regulatory process and write any regulation it would like (quite the disincentive for the Department of Education to be collaborative), it also opens the rule to greater scrutiny and a greater number of parties interested in settling things in court.

If conservatives are not included on negotiating panels, the Biden administration may not have to compromise much to win consensus on the zealous agenda it has outlined. If conservatives remain disengaged, they may not bother compromising at all. New America, a home to many former Barack Obama-era appointees at the time, previewed the DeVos rulemaking agenda as follows:

With a dozen separate issues on its deregulatory agenda, the Department will place a high burden on stakeholders to complete the process with inadequate time to deliberate fully and prevent the possibility of consensus among negotiators. And when that happens, the Department gets to decide how it will write the rule, without negotiators.⁸

Those DeVos rules ultimately did reach consensus, but it’s certainly one approach the new team could take. Many of those Obama appointees have returned to work under Secretary of Education Miguel Cardona and will soon tackle a proposed list of at least 14 topics.

Two Particularly Contested Issues: Gainful Employment and Borrower Defense

Sometimes, however, the issues are controversial enough to prevent consensus even if it might be sought, allowing the next administration to try its hand at a better result. The previous two administrations failed to achieve consensus on either of two major regulations: gainful employment and borrower defense. In each case, the Obama administration took a handful of words in statute and turned them into hundreds of pages of regulations. Under Secretary DeVos, we reversed course, but now, the Biden team has announced it wants to backtrack.⁹

The words “gainful employment” originated as a differentiation in law between traditional colleges and for-profit colleges (and some community college programs), which “prepare students for gainful employment in a recognized occupation.”¹⁰ This simple phrase was transformed into a complex formula involving students’ after-graduation debt and earnings. Poor performance could result in a loss of financial aid eligibility if these metrics fell below acceptable levels (a death penalty for almost any college), regardless of economic circumstances or whether colleges were preparing cosmetologists or engineers.¹¹

Secretary DeVos repealed gainful employment entirely because it went beyond congressional intent, was based on flawed statistical methodology that was difficult to accurately administer, and limited that flawed attempt at accountability to a fraction of colleges.¹² At this point, the Biden Department of Education could choose to double down on the Obama-era regulation or collaborate across the ideological spectrum to find a federal accountability mechanism that can ensure that all students, regardless of their college’s sector, are graduating with useful knowledge and skills.

Borrower defense started as a very limited and rarely implemented mechanism to allow students to receive loan relief if their college acted dishonestly and caused them harm.¹³ However, it transformed into a massively complex regulation that required the department to adjudicate all manner of claims by students against their college or university (some of whom were genuinely mistreated and simply did not wish to repay their loans). Secretary DeVos narrowed this scope to focus on real harm, protect due process rights, and ensure genuine

bad-actor institutions, rather than taxpayers, would pay more relief. However, it was still criticized by conservatives who wanted tougher restrictions and by liberals who wanted an easier path to relief for students.

What’s Ahead for the Department of Education’s Latest Negotiated Rule-making Process?

In addition to gainful employment and borrower defense, the Biden administration will regulate on some potentially bipartisan topics such as Pell Grant eligibility for prison education programs and the (currently confusing) circumstances under which students without a high school diploma may begin taking college courses. However, most other topics promise to be much more controversial and potentially impactful, particularly in achieving loan forgiveness and anti-for-profit college aims.

On May 26, the Department of Education under President Biden announced it would not only (once again) revisit borrower defense and gainful employment but also tackle an extensive list of other topics.¹⁴ While only a draft list of broad topics was released, gainful employment will serve as the leading edge of the anti-for-profit college agenda, and borrower defense will serve as the leading edge of its loan forgiveness and free-college agenda. Subsequently, in August, the Biden team announced that the free-college agenda will be taken up first and that the rest will come at an undisclosed later date.¹⁵

As a candidate, Biden pledged he would “require for-profits to first prove their value to the U.S. Department of Education before gaining eligibility for federal aid” and would “crack down on private lenders.”¹⁶ While some for-profit schools and lenders have certainly wronged their students, the president did not suggest similar scrutiny for public or nonprofit colleges and lenders, regardless of the impact on students and borrowers.

With loan forgiveness, the rulemaking opens several fronts, including expanding eligibility for receiving loan forgiveness if a student’s school closes, a student works in a “public service” occupation, or a student is totally and permanently disabled (a designation tied to the troubled systems managed by the Social Security Administration and

Department of Veterans Affairs). Each path has many deserving recipients, but major changes threaten to open the floodgates, particularly in the case of the Public Service Loan Forgiveness Program.

Of potentially greater consequence, the department also seems poised to change how interest is capitalized on loans and create yet another federal loan repayment program similar to existing options, which tie payments to borrowers' income and forgive balances after a set number of years. Today's income-based programs (not to be confused with income share agreements), including those created without congressional approval during the Obama administration, are extremely generous, resulting in only 51 percent of balances being repaid.¹⁷ If a new program is less generous, few borrowers will select it, and its creation will prove pointless. If it is more generous, borrowers will flock to it, and taxpayers without college degrees will be responsible for repaying an even greater share of loans taken by future college students, without Congress taking any action.

The topics selected also offer opportunities to deliver a death blow to many remaining for-profit colleges that have survived previous regulatory campaigns, including those that are the only viable path for students interested in a given occupation in a given location. Beyond the gainful employment rule, the department may prevent these colleges from giving up their for-profit status to join a more favorably regulated class, even if the IRS recognizes that status. It may also make it slower and more difficult for these schools to receive department approval for new programs and campuses that respond to workforce needs and potentially invent a whole host of new requirements via the broad administrative capability and financial responsibility requirements in law. The department will also tackle mandatory pre-dispute arbitration and similar terms and conditions broadly disfavored by progressives and the attorneys who want to open new legal fronts against these schools.

About the Author

Michael Brickman is a national public policy leader who specializes in developing cutting-edge innovations in education reform, skills-based hiring, and the future of work. He advises companies, nonprofits, and investors on the innovations that are changing how we work and learn.

How to Get More Involved in the Negotiated Rulemaking Process

Conservatives may wait to weigh in after the negotiations are complete, a draft regulation is written, and comments are solicited. That would be a mistake. If conservative views are not represented on the negotiating panels through written arguments, engagement at the hearings (where public comment is taken), and social media and other channels, consensus on one or more topics is possible within an ideologically uniform echo chamber. This may give the rules a semblance of undeserved legitimacy, and the regulation is unlikely to change significantly in response to subsequent public comments. Conservatives should be nominated to the panels—by responding to the department's rulemaking notices¹⁸ or participating at the beginning of the negotiations themselves—in the hope that their voices will be heard and a genuine consensus can be achieved that considers a diverse set of views. They can also request the addition of underrepresented voices such as taxpayers, employers, and students who have benefited through paths other than those supported by federal student loan subsidies and forgiveness programs.

If consensus is not achieved and conservatives have not made the public case for their preferred positions, the department will likely feel free to write regulations that consider only its own wishes and those pushing it to go even further. This may add legal risk to the final rule, but overturning a rule through the courts is far costlier with longer odds than is attempting to influence it from the beginning. Conservatives need to speak early and often, to not only the budgetary challenges and questionable incentives these policy proposals will bring about but also the system of executive branch legislating conducted quietly by an unelected group likely to consist mostly of lobbyists and ideologically aligned advocates.

Notes

1. Administrative Conference of the United States, “Procedures for Negotiated Proposed Regulations,” June 18, 1982, <https://www.acus.gov/recommendation/procedures-negotiating-proposed-regulations>.
2. Administrative Conference of the United States, “Procedures for Negotiated Proposed Regulations.”
3. Administrative Conference of the United States, “Procedures for Negotiated Proposed Regulations.”
4. US Department of Transportation, “Accessible Lavatories on Single-Aisle Aircraft: Part 1,” *Federal Register* 85, no. 1 (January 2, 2020), <https://www.federalregister.gov/documents/2020/01/02/2019-27631/accessible-lavatories-on-single-aisle-aircraft-part-1>.
5. Administrative Conference of the United States, “Procedures for Negotiated Proposed Regulations.”
6. 20 USC § 1098a.
7. US Department of Education, “Negotiated Rulemaking for Higher Education 2018–19,” August 4, 2021, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2018/index.html>.
8. Amanda Martinez, “The Fight for the Future of Higher Education: Neg Reg 101,” *New America*, October 22, 2018, <https://www.newamerica.org/education-policy/edcentral/fight-future-higher-education-neg-reg-101/>.
9. US Department of Education, “Negotiated Rulemaking Committee; Public Hearings,” *Federal Register* 86, no. 100 (May 26, 2021), <https://www.federalregister.gov/documents/2021/05/26/2021-11120/negotiated-rulemaking-committee-public-hearings>.
10. 20 USC § 1002.
11. US Department of Education, “Negotiated Rulemaking 2013–2014—Gainful Employment,” August 15, 2018, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/gainfulemployment.html>.
12. US Department of Education, “Negotiated Rulemaking for Higher Education 2017–2018,” October 26, 2017, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/index.html>.
13. US Department of Education, “Negotiated Rulemaking for Higher Education 2015–2016,” August 15, 2018, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2016/index.html>.
14. US Department of Education, “Negotiated Rulemaking Committee; Public Hearings.”
15. US Department of Education, “Negotiated Rulemaking Committee; Negotiator Nominations and Schedule of Committee Meetings,” *Federal Register* 86, no. 151 (August 10, 2021), <https://www.federalregister.gov/documents/2021/08/10/2021-16953/negotiated-rulemaking-committee-negotiator-nominations-and-schedule-of-committee-meetings>.
16. JoeBiden.com, “The Biden Plan for Education Beyond High School,” 2021, <https://joebiden.com/beyondhs/>.
17. Josh Mitchell, “Student Loan Losses Seen Costing U.S. More Than \$400 Billion,” *Wall Street Journal*, November 21, 2020, <https://www.wsj.com/articles/student-loan-losses-seen-costing-u-s-more-than-400-billion-11605963600>.
18. US Department of Education, “Negotiated Rulemaking for Higher Education 2021–22,” <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html>.

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